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The Perils of Popularity: David Josiah Brewer and the Politics of Judicial Reputation

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The Perils of Popularity: David Josiah Brewer and the Politics of Judicial Reputation

*J. Gordon Hylton**

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David Brewer is hardly a household name in the contemporary legal academy. Most American professors of constitutional law would have a hard time placing his nearly twenty-one years of service on the U.S. Supreme Court, though most would be savvy enough to guess “*Lochner* era.” He is probably the least well-known of all the Justices whose careers are examined in this Symposium. (Brewer’s longtime colleague Rufus Peckham is probably his chief contender for this title.) For the record, Brewer sat on the Supreme Court from January of 1890 until his death in March of 1910.¹

In his own era, Brewer was anything but obscure. He played an important, and sometimes pivotal, role on the nation’s highest court in the 1890s and the first decade of the twentieth century.² During his

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1. Melville Westin Fuller was the Chief Justice during Brewer’s entire tenure on the Supreme Court. Fuller assumed the office of Chief Justice in 1888 and served until his death in 1910, which came a few months after Brewer’s death. For discussion of the Fuller Court generally, see JAMES W. ELY, *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910* (1995), and JOHN E. SEMONCHE, *CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890–1920* (1978).

2. See generally ELY, *supra* note 1; SEMONCHE, *supra* note 1. For biographical information on David Brewer, see generally MICHAEL J. BRODHEAD, *DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837–1910* (1994). The most important sources of primary materials pertaining to Brewer are the Brewer Family Papers at Yale University and Brewer’s papers in the Library of Congress. For other primary sources, see the bibliography in the Brodhead biography. *Id.* at 239–52.

years on the Court, he authored 540 majority opinions, a total that had been exceeded by only five Justices at the time of his death in 1910.³ He also cast what turned out to be the deciding vote in a number of landmark cases, including the *Income Tax Case*⁴ (1895), the *Northern Securities* antitrust case⁵ (1904), and *Lochner v. New York*⁶ (1905). Moreover, he established himself as the leading dissenter on the Fuller Court, dissenting even more frequently than “The Great Dissenter” John Marshall Harlan.⁷ During his time on the Court, he was also unquestionably the Justice most familiar to the American public.⁸

Given Brewer’s long service on the Supreme Court and his unquestioned prominence in his own time, it is somewhat surprising that the Kansan has been so thoroughly “neglected” by constitutional scholars and Supreme Court historians. A 1938 Princeton political science dissertation⁹ and a relatively brief biography published in 1994 by Southern Illinois University Press¹⁰ are the only full-length studies of Brewer. While there are many articles in law reviews and state historical journals that touch on various aspects of his career and constitutional views, none has convinced the community of constitutional scholars that either his life or his set of ideas is worthy of special attention.¹¹

3. The five Justices who authored a greater number of majority opinions by the time of Brewer’s death were Justices Samuel Miller, Stephen Field, Morrison Waite, John Marshall Harlan, and Melville W. Fuller. ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* 142–44 (1978). Waite and Fuller were Chief Justices and Miller, Field, and Harlan would appear on almost every list of “great” Justices. As for the exact number of opinions written by Brewer, there is some disagreement. The author’s count of Brewer’s opinions, based on a review of all opinions handed down by the Supreme Court during David Brewer’s tenure, is 540 majority opinions, 10 concurring opinions, 55 dissenting opinions, and 20 statements. According to a different tabulation, Brewer authored 607 opinions which included 533 majority opinions, 8 concurring opinions, 57 dissenting opinions, and 9 statements or other opinions. *Id.* at 144. A search of the LexisNexis Supreme Court cases database yields totals of 539 majority opinions, 10 concurring opinions, and 66 dissenting opinions.

4. *Pollack v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895).

5. *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

6. 198 U.S. 45 (1905).

7. According to the statistics compiled in BLAUSTEIN & MERSKY, *supra* note 3, at 148, Brewer dissented an average of 11.3 times per term during his years on the Court. Harlan averaged 11.1 dissents per term. Of the other Justices on the Fuller Court only Peckham (10.9) and White (10.7) averaged more than 10 dissents per term. *Id.*

8. See discussion *infra* notes 14–34.

9. Lynford A. Lardner, *The Constitutional Doctrines of Justice David Josiah Brewer* (1938) (unpublished Ph.D. dissertation, Princeton University) (on file with the Vanderbilt Law Review).

10. BRODHEAD, *supra* note 2.

11. Published articles focusing on Brewer’s role on the Court were particularly scarce before 1990. The literature, such as it was, included Francis Bergan, *Mr. Justice Brewer: Perspective of a*

I. THE PEOPLE'S SUPREME COURT JUSTICE

Brewer's appeal to his contemporaries was enhanced by his compelling life story.¹² He was born in 1837 in Smyrna, Asia Minor, where his New England missionary parents, the Rev. Josiah Brewer and his wife Emilia Field Brewer, operated a missionary school. (Living with the Brewers in Smyrna was Mrs. Brewer's thirteen-year-old brother Stephen Field, David Brewer's uncle and future colleague on the U.S. Supreme Court.) In 1838, the Brewers returned to New England, where the elder Brewer held a variety of educational and ministerial positions. David was educated first at Wesleyan College and then at Yale, where he was greatly influenced by the political scientist and protestant minister Theodore Dwight Woolsey.¹³ At Yale he was also a classmate of his future Supreme Court colleague Henry Billings Brown.

After graduating from Yale in 1856, Brewer spent one year studying law in the office of his uncle David Dudley Field in New York City and then a second year at the Albany Law School, from which he graduated in 1858. During this time, Brewer—who shared his abolitionist father's belief in reform—became radicalized by the debate over slavery and particularly by the U.S. Supreme Court's *Dred Scott* decision, which Brewer viewed as reprehensible. Following his graduation from Albany, he moved—at the height of the battle over slavery in Kansas—to Kansas City, Missouri, where he contemplated starting a law practice. After an unsuccessful few months practicing law, he ventured to Colorado in search of gold, only to return empty-

Century, 25 ALB. L. REV. 191 (1961); D. Stanley Eitzen, *David J. Brewer, 1837–1910: A Kansan on the United States Supreme Court*, 12 EMPORIA ST. RES. STUD. 1 (1964); Owen M. Fiss, *David J. Brewer: The Judge as Missionary*, in *THE FIELDS AND THE LAW* 53 (1986); and Ralph E. Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615 (1965).

Although the flow still resembles a trickle more than a torrent, there has been a slight increase in the number of scholarly articles about Brewer since 1990. These include: Steven K. Green, *Justice David Josiah Brewer and the "Christian Nation" Maxim*, 63 ALB. L. REV. 427 (1999); J. Gordon Hylton, *David Josiah Brewer: A Conservative Justice Reconsidered*, 94 J. SUP. CT. HIST. 45 (1994) [hereinafter Hylton, *Conservative Justice*]; J. Gordon Hylton, *David Josiah Brewer and the Christian Constitution*, 81 MARQ. L. REV. 417 (1998) [hereinafter Hylton, *Christian Constitution*]; J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315 (1991) [hereinafter Hylton, *Judge Who Abstained*]; Linda Przybyszewski, *Judicial Conservatism and Protestant Faith: The Case of Justice David J. Brewer*, 91 J. AM. HIST. 471, 476 (2004); and William M. Wiecek, *Justice David J. Brewer and "the Constitution in Exile,"* 33 J. SUP. CT. HIST. 170 (2008).

12. The following biographical sketch is based upon BRODHEAD, *supra* note 2, and the Hylton articles, *supra* note 11.

13. Woolsey was also president of Yale from 1846 to 1871. For Woolsey's influence on Brewer, see Hylton, *Christian Constitution*, *supra* note 11, at 420–22.

handed to Leavenworth, Kansas, in 1859, where he would remain until his appointment to the U.S. Supreme Court in 1889.

In Leavenworth, Brewer practiced law (though not very successfully) and held a variety of public positions, including commissioner for the local federal circuit court, superintendent of schools, judge of the county probate court, and later state district court judge. In 1870, he was elected to the Kansas Supreme Court, on which he served until he was appointed judge of the U.S. Eighth Circuit Court in 1884. In 1889, President Benjamin Harrison named Brewer to the U.S. Supreme Court to replace the recently deceased Justice Stanley Matthews. The U.S. Senate confirmed his appointment that December.

Brewer's appointment to the Supreme Court made him a national figure, and he never hesitated to take advantage of the opportunities offered by his new position. As a state and federal judge in Kansas, he had spoken regularly in public and published his views on a variety of topics in a wide range of publications. After 1890, he moved these activities to a national stage, and it was his off-the-bench opinions rather than his judicial decisions that caught the attention of the American public.

When Brewer died suddenly at age seventy-two on March 27, 1910, obituaries in the nation's leading newspapers not only remembered him as a great jurist but also celebrated the role that he had played in making the Supreme Court accessible to the general public. As the *New York Times* put it:

Of all the justices of the Supreme Court of the United States[,] David J. Brewer was the best known to the people. They saw more of him. It was his habit, upon occasion, to put aside the robe of the Justice, the manner and the speech of the bench, and to address his fellow-citizens from lecture platforms upon matters that concerned them all.¹⁴

According to the *Chicago Tribune*, "Justice Brewer's death will be a big loss to the public in other ways than as a member of the bench. He was the only member of the bench who freely expressed his opinion on large public questions."¹⁵ That same newspaper also noted that Brewer "was the one member of the Supreme [C]ourt who was in almost constant demand as a lecturer and after-dinner speaker."¹⁶

The *Washington Post* was particularly effusive, proclaiming that during his years on the Supreme Court, Brewer

had become the embodiment of the ideals cherished by the people in respect to those chosen to sit in the temple of justice. His public monument is his own pure fame as a

14. *Justice Brewer*, N.Y. TIMES, Mar. 30, 1910, at 10.

15. *Justice Brewer Dies Suddenly*, CHI. DAILY TRIB., Mar. 29, 1910, at 1.

16. *Id.* at 6.

judge. . . . He had become like one of the fathers of the republic, whose voice was the voice of wisdom, understanding, and patriotism.¹⁷

Even a progressive journal like *Outlook*, which was critical of many of Brewer's views on law and politics, acknowledged his prominence and popularity. It described Brewer as "one of the most widely known and popular of all the judges who have ever sat upon the Federal Supreme Court bench," and it noted:

It is probable that among the names of the Supreme Court Justices whom most people would recall there would be found his. This was largely because more than any other Supreme Court Justice in recent years Justice Brewer appeared before popular audiences and spoke his mind freely on public questions.¹⁸

The *Virginia Law Register*, a law journal, described the late Justice as a man who "mingled with the people and addressed his countrymen . . . upon matters concerning the general welfare" and who "did not hesitate to express vigorous opinion upon all the great questions of the day."¹⁹

The Proquest Historical Newspapers database confirms Brewer's visibility to the public. A search for stories with references to the Supreme Court Justices of the Fuller Court era reveals that the three Justices whose names appeared most frequently in the popular press were Chief Justice Melville Fuller, Associate Justice John Marshall Harlan, and David Brewer. Although Fuller was the Chief Justice and Harlan was the Court's senior member for most of Brewer's tenure, it is Brewer's name that appears most frequently. In the twenty-one-year period between January 1, 1890, and January 1, 1911, there are 2,024 articles that mention Chief Justice Fuller, 2,634 that mention Justice Harlan, and 3,038 that mention Justice Brewer. While the stories that mention Fuller and Harlan almost always do so in the context of the Supreme Court itself, the Brewer stories frequently discuss him in the context of events (usually speaking engagements) that have little direct connection to the Court.²⁰

As his eulogists acknowledged, Brewer's fame was largely the product of his love of public speaking and his willingness to go almost anywhere to address an audience. He spoke to bar associations, to missionary groups, to churches, to life insurance agents, at public health conferences, at conferences on international arbitration, at graduation ceremonies of prestigious and not-so-prestigious colleges,

17. *Death of Justice Brewer*, WASH. POST, Mar. 29, 1910, at 6.

18. *Mr. Justice Brewer*, 94 OUTLOOK 785, 785 (1910).

19. *Mr. Justice Brewer*, 16 VA. L. REG. 65, 65 (1910).

20. This is based on the version of Proquest available through the University of Virginia Library in March of 2008.

at all-black colleges, and at football dinners. He was wonderfully democratic in that regard. When the Supreme Court recessed, Brewer usually could be found heading for the Washington train station to travel to yet another destination to deliver a public address. His papers contain almost two hundred manuscript addresses, but contemporary newspaper accounts suggest that his number of public addresses far exceeded that total.²¹

Brewer also regularly contributed articles—often very thinly reworked versions of his public addresses—to the popular and religious presses of his day, and many of his other addresses were published in pamphlets or expanded to book form.²² One could read about Brewer's views on lynching in *Leslie's Weekly*;²³ on juries in *International Monthly*;²⁴ on African-American education in the *Southern Workman*;²⁵ on individual liberty, organized wealth and the judiciary, and the right to appeal in *The Independent*;²⁶ on the religious life of judges in *Outlook*;²⁷ on the prospects for international peace in *Christian Endeavor World*;²⁸ on women's suffrage in *Ladies World*;²⁹ on the importance of the YMCA in *Intercollegian*;³⁰ on the legality of Jesus's conviction and execution in *Sunday School Times*;³¹ and on the Green Mountain State in *The Vermonter*.³² In addition, he edited a ten-volume series entitled *The World's Best Essays*; he edited a second ten-volume series, *The World's Best Orations*; and he co-authored a short treatise on international law with Supreme Court Reporter Charles Henry Butler.³³ Historian Linda Przybyszewski has

21. Brewer Family Papers (on file with the Yale University Sterling Memorial Library); Papers of David J. Brewer (on file with the Library of Congress Manuscript Division).

22. For a nearly complete list of Brewer's published articles and books, see BRODHEAD, *supra* note 2, at 241–43, 247–49.

23. David J. Brewer, *Plain Words on the Crime of Lynching*, 97 LESLIE'S WKLY. 182 (1903).

24. David J. Brewer, *The Jury*, 5 INT'L MONTHLY 1, 1–9 (1902).

25. David J. Brewer, *Justice Brewer's Address*, 35 S. WORKMAN 359, 359–61 (1906).

26. David J. Brewer, *The Liberty of Each Individual*, 45 INDEP. 2 (1903); David J. Brewer, *Organized Wealth and the Judiciary*, 57 INDEP. 301 (1904); David J. Brewer, *The Right of Appeal*, 55 INDEP. 2547 (1903).

27. David J. Brewer, *The Religion of a Jurist*, 80 OUTLOOK 533, 533–36 (1905).

28. David J. Brewer, *A Second Hague Conference: What May Be Expected From It*, 19 CHRISTIAN ENDEAVOR WORLD 787, 787–88 (1905).

29. David J. Brewer, *Woman Suffrage: Its Present Position and Its Future*, 30 LADIES' WORLD 6, 6, 29 (1909).

30. David J. Brewer, *The Young Men's Christian Association and American Solidarity*, 27 INTERCOLLEGIAN 101, 101–03 (1905).

31. David J. Brewer, *Were Christ's Trial and Death Legal?*, 1906 SUNDAY SCH. TIMES 665, 665–66.

32. David J. Brewer, *The Green Mountain State*, 1 VERMONT 125, 125–26 (1896).

33. DAVID J. BREWER & CHARLES HENRY BUTLER, *INTERNATIONAL LAW: A TREATISE* (1906); *THE WORLD'S BEST ESSAYS: FROM THE EARLIEST PERIOD TO THE PRESENT TIME* (David J. Brewer

described Brewer as “probably the most widely read jurist in the United States at the turn of the century.”³⁴

In addition to his public speaking and writing, Brewer served in a variety of high-profile public positions during his tenure on the Supreme Court. In 1895, he temporarily took leave of his Supreme Court duties to serve as president of the Venezuela-British Guiana Border Commission, and he was a regular participant at the Lake Mohonk, New York, conferences on world peace. In 1904, he served as president of the Universal Congress of Lawyers and Jurists, held in conjunction with the St. Louis World’s Fair, and in 1907, he was one of the founders of the American Society of International Law. A longtime officer of the American Home Missionary Association, Brewer was also an active supporter of the Associated Charities of Washington, D.C. In addition, he was actively involved with the legal profession, and he served as a member of the committee that drafted the American Bar Association’s 1908 Canons of Ethics. Throughout his years in Washington, Brewer was a part-time professor of constitutional and international law at the Columbian Law School (now the law school of George Washington University). Although part of Brewer’s motivation for his off-the-bench career was financial—he had no significant financial assets or income other than his judge’s salary—Brewer derived great satisfaction from the public attention and admiration that he received for his extrajudicial activities.

II. THE ARCH-CONSERVATIVE DEFENDER OF PROPERTY

Not everyone was enamored with Brewer’s penchant for public appearances. His Supreme Court colleague Oliver Wendell Holmes, while insisting that he liked Brewer personally, labeled him an *enfant terrible* in a letter to his English friend Frederick Pollock. In the letter, he also mocked Brewer’s “itch for public speaking.”³⁵ Edwin Corwin, who began his long scholarly career while Brewer was still on the bench, later noted that “Justice Brewer was inordinately fond of the lecture platform, doing his best to restore the old Federalist conception of the judges as moral mentors of the people.”³⁶ During his final years on

ed., 1900); *THE WORLD’S BEST ORATIONS: FROM THE EARLIEST PERIOD TO THE PRESENT TIME* (David J. Brewer ed., 1899).

34. Przybyszewski, *supra* note 11, at 476.

35. Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 1, 1910), in 1 *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932*, at 160, 160 (Mark DeWolfe Howe ed., 1941).

36. EDWIN S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* 198 n.41 (1938).

the Court, Brewer's public remarks became increasingly political and often were targeted at progressive initiatives. President Theodore Roosevelt in particular was the target of harsh criticism from Brewer. Roosevelt, in turn, detested Brewer and privately described him as a "menace to the welfare of the Nation"³⁷ and as a judge who had "a sweetbread for a brain."³⁸ To Roosevelt, Brewer was "one of the corporation judges whose presence on the bench has been a source of grave discredit and weakness to it."³⁹

If one looks at the trajectory of Brewer's post-1910 reputation, a distinct pattern emerges. For two decades after his death, public opinion of Brewer was divided. Some students of the Court, including liberals like Felix Frankfurter and Jerome Frank, remembered David Brewer as an important and influential Justice.⁴⁰ However, following the lead of Theodore Roosevelt, other progressive commentators shortly after Brewer's death began to describe him as an arch-conservative judge who placed the interests of American corporate plutocrats ahead of those of the general public. He was derided as an apostle of laissez-faire, a social Darwinist, an individual woefully out of touch with the social realities of his day, and a political reactionary whose true agenda was the advancement of the interests of large business enterprises.

In his history of the Supreme Court published shortly after Brewer's death, the muckraking journalist Gustavus Myers described Brewer as a Justice who "indoctrinated law in accordance with the demands of capitalist interests,"⁴¹ while the progressive journal *Outlook* somewhat more charitably described him as one who "followed the standards of an individualistic age from which [this magazine] believes the country is emerging."⁴² Even Henry Billings Brown, Brewer's Yale classmate and colleague on the Supreme Court (and hardly a judicial

37. Letter from Theodore Roosevelt to Henry Lewis Stimson (Feb. 5, 1912), in 7 THE LETTERS OF THEODORE ROOSEVELT 494, 495 (Elting E. Morrison ed., 1954) [hereinafter LETTERS OF THEODORE ROOSEVELT].

38. Letter from Oliver Wendell Holmes to Harold J. Laski (July 27, 1930), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 1268, 1270 (Mark DeWolfe Howe ed., 1953).

39. Letter from Theodore Roosevelt to William Allen White (Nov. 26, 1907), in 5 LETTERS OF THEODORE ROOSEVELT, *supra* note 37, at 855, 855.

40. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 788 (1957). For Frankfurter's view of Brewer, see HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF THE APPOINTMENTS TO THE SUPREME COURT 10-11 (2d ed. 1985) (describing Frankfurter's list of "great" Supreme Court Justices).

41. GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 739 (1918).

42. *Mr. Justice Brewer*, *supra* note 18, at 786.

radical), identified him after his death as one who embraced “the conservative views . . . regarding the rights of property.”⁴³

After the 1930s, favorable views of Brewer almost disappeared. He and most of his Fuller Court colleagues were linked with the Four Horsemen of the 1920s as examples of Justices who participated in the corporate takeover of the American judiciary. Brewer was described variously as the “leader of the ultraconservative economic laissez-faire advocates on the Court”;⁴⁴ one of “the tough-minded twins of ultra-conservatism”;⁴⁵ the “William O. Douglas of the Right”;⁴⁶ a “firm believer in laissez faire”;⁴⁷ “that old laissez-faire advocate”;⁴⁸ a “vigorous proponent of judicial sanctions for laissez-faire conservatism”;⁴⁹ a judge who possessed a “conservative commitment to a rigidly circumscribed concept of government regulatory authority”;⁵⁰ one who stood in “staunch defense of the rights of liberty and property”;⁵¹ and an individual whose “thought turned in upon legal principles instead of expanding outward to an examination of the economic and social conditions to which law is intended to apply.”⁵²

Reflecting the new consensus, historian Arnold Paul wrote of Brewer in the mid-1960s:

Brewer held to a strictly conservative, sometimes reactionary, position on the Court, opposing firmly the expansion of government regulatory power, state or federal. [He was] an outspoken and doctrinaire conservative who made little pretense of “judicial self-restraint” and few compromises to Court consensus. . . . [He was] dogmatic and ultraconservative in a wide spectrum of social, political, and judicial matters. What Brewer represented was both an older kind of conservatism, manifested by such themes as a Puritan stress on obligation and character, an acceptance of social stratification (in conjunction with an insistence on social order), and a belief in *noblesse oblige*—and a newer kind more representative of his contemporary milieu, highly materialistic and property-conscious, elitist in the Social Darwinian sense, and fearful of the social challenges accompanying the growth of industrialism.⁵³

43. MEMOIR OF HENRY BILLINGS BROWN: LATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 32 (Charles A. Kent ed., 1915).

44. ABRAHAM, *supra* note 40, at 147–48.

45. FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 187 (1955). The other “twin” was Rufus Peckham. *Id.*

46. ALAN F. WESTIN, AN AUTOBIOGRAPHY OF THE SUPREME COURT 24 (1963).

47. SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE 136 (1956).

48. LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877–1917, at 185 (1971).

49. 5 LETTERS OF THEODORE ROOSEVELT, *supra* note 37, at 397 n.1.

50. WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY, 1889–1932, at 93 (1969).

51. CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 563 (1943).

52. Lardner, *supra* note 9, at 221.

53. Arnold M. Paul, *David J. Brewer*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789–1978, at 1515, 1520 (Leon Friedman & Fred L. Israel eds., 1980); *see also* ARNOLD M.

Until the late 1970s, this view of Brewer and his Fuller Court colleagues held sway among constitutional scholars and historians. At that point in history, one could have made the argument that Brewer was not worthy of attention because his ideas were so corrupt and outdated that little could be gained by studying his career.

III. BREWER AND FULLER COURT REVISIONISM

The scholarship of the past three decades convincingly has demolished the view of the Fuller Court as little more than a water carrier for corporate America. This literature has emphasized that the Justices of the Waite and Fuller Courts were part of a constitutional tradition rooted in the liberalism of antebellum America and characterized by hostility to government-sanctioned monopolies and a belief in the sanctity of free labor.⁵⁴ Initially, this reevaluation did little to rehabilitate the reputation of David Brewer. What resulted was a new consensus that, while the Fuller Court as a whole was not nearly as committed to the protection of property and the principles of laissez-faire as its progressive critics had claimed, such charges were fair when applied to David Brewer (and usually to Rufus Peckham as well). Consequently, during the 1980s and the early 1990s, even while scholarly attitudes toward the Fuller Court as a whole softened, Brewer continued to be described as one who stood in the "forefront of the

PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 70-72 (1960) (describing Brewer's 1891 Yale commencement address, *Protection to Private Property from Public Attack*).

54. See generally ELY, *supra* note 1. "Fuller Court revisionism" began in the late 1970s with the work of Charles McCurdy and John Semonche playing leading roles. See Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975); Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporate Law, 1869-1903*, 53 BUS. HIST. REV. 302 (1979); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 Y.B. SUP. CT. HIST. SOC'Y 20; see also SEMONCHE, *supra* note 1.

For later examples of the literature that led to this reevaluation of the Fuller Court, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 1-18 (1993); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937* (1991); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 2 LAW & HIST. REV. 293 (1985); James W. Ely, Jr., *Judicial Liberalism in the Gilded Age: Appraising John Marshall Harlan*, 21 REV. AM. HIST. 57, 57-62 (1993); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991); and Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 (1985). For a discussion of the historiography of the Fuller Court prior to 1975, see Mary Cornelia Porter, *That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court*, 1976 SUP. CT. REV. 135, 135-59.

Court's assault on social legislation,"⁵⁵ a judge who "forged conservative socioeconomic beliefs into constitutional doctrine" and "unabashedly relied on judicial power to protect private property rights from the supposed incursions of state and federal legislatures,"⁵⁶ and one whose "overriding purpose was to limit and structure state interventions into the economy and to affirm the idea of limited government."⁵⁷ Scholars labeled Brewer as a "doctrinaire conservative" who was "the most formalist member of the Court at the time"⁵⁸ and "one of the most conservative members of a notoriously conservative bench . . . obsessed with the importance of private property to the preservation of a free and just society."⁵⁹ By advancing a more moderate interpretation of the Fuller Court as a body, some revisionist historians actually made Brewer seem even more of a reactionary figure than before.

Given the seeming uniformity of "liberal" scholarly opinion regarding Brewer's conservatism, a "David Brewer revival" might have been expected with the rise of conservative constitutional theories in the 1980s. Yet Brewer's name went largely unmentioned by the advocates of Reaganite constitutionalism. Neither Ronald Reagan nor anyone else in the 1980s called for the appointment of "more David Josiah Brewers" to the Supreme Court.⁶⁰

IV. DAVID BREWER REVISIONISM

In his 1978 study, *Charting the Future: The Supreme Court Responds to a Changing Society, 1888-1920*, historian John Semonche argued that Brewer's record on the Court showed that he was more pragmatic than ideological and that his reputation as an "arch

55. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 82 (1990).

56. Kermit L. Hall, *Brewer, David J. (1837-1910)*, in 1 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 240, 240 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

57. Fiss, *supra* note 11, at 58.

58. WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 121, 126 (1988).

59. Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 215-16 (1984).

60. This is difficult to document, but in the LexisNexis newspaper/news magazine database, there is only one story published before January 1, 1993 that mentions both Ronald Reagan and David Brewer and that is a 1984 *Time* magazine story about religion in schools that mentions in passing Brewer's opinion in the *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (declaring the United States to be a Christian nation). This is also apparently the only mention of Brewer in the database prior to January 1993. While the pre-1993 LexisNexis database is much less extensive than the modern version, there are in excess of 3000 stories that include the terms "Reagan," "Supreme Court" and "appointment." (The database will not return a total for the number of qualifying sources if the number is larger than 3000.)

conservative” was in need of reconsideration. At the time, very few historians and legal scholars picked up on that suggestion.⁶¹ However, in the 1990s a small number of scholars demonstrated that Brewer’s overall record on the Court was more moderate than his critics had maintained. Assertions of Brewer’s extremism usually had been based on specific references to his intemperate language in a small number of opinions and public addresses and not on his overall record on the Supreme Court.⁶²

It is true that, at the time of his appointment to the Supreme Court, Brewer already had a reputation as a defender of property rights. He angered the prohibitionists in his own state—even though Brewer himself supported prohibition—by ruling that the state had to compensate the owners of breweries and distilleries that were rendered virtually worthless by the enactment of the prohibition amendment to the Kansas Constitution in 1880.⁶³ Similarly, his nomination to the Supreme Court had been opposed by the Kansas Grange, which viewed his judicial decisions as insufficiently sympathetic to the cause of railroad rate regulation. Brewer accepted the legitimacy of rate regulation but insisted that rates had to be set high enough for the railroad to earn a reasonable return on its investment. He also believed that courts properly could determine the reasonableness of rates. Some southern senators also opposed Brewer because they believed that he was too sympathetic to African-Americans.⁶⁴

A handful of strident public addresses delivered shortly after his appointment to the Court enhanced Brewer’s reputation as a defender of property rights. Particularly provocative were “The Protection of Property from Public Attack” (delivered at his alma mater Yale and published as a magazine article and as a pamphlet) and “The Movement toward Coercion” (an address before the New York State Bar Association in 1893, which also was published as a

61. SEMONCHE, *supra* note 1, at 244–45.

62. The principle works of “Brewer revisionism” since 1978 are BRODHEAD, *supra* note 2; EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 38–63, 319–20 (2000), even though Brewer is a relatively minor character in the overall work; and Hylton, *Conservative Justice*, *supra* note 11.

63. *Kansas v. Walruff*, 26 F. 178, 199 (C.C.D. Kan. 1886). This decision was effectively overruled by the United States Supreme Court in *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887), which was decided while Brewer was still a Judge of the Eighth Circuit Court of Appeals.

64. For Brewer’s complicated relationship to the question of African-American rights, see Hylton, *Judge Who Abstained*, *supra* note 11. On Southern opposition to his appointment to the Supreme Court from within his circuit because of his racial views, see BRODHEAD, *supra* note 2, at 75.

pamphlet).⁶⁵ Moreover, during his time on the Supreme Court, Brewer was found in the majority of what used to be thought of as the most “notorious” pro-property decisions of the Fuller Court: *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota* (1890);⁶⁶ *Pollack v. Farmer’s Loan & Trust* (the income tax case, 1895);⁶⁷ *United States v. E. C. Knight Co.* (1895);⁶⁸ *In re Debs* (Brewer’s opinion, 1895);⁶⁹ *Allgeyer v. Louisiana* (1897);⁷⁰ *Smyth v. Ames* (affirming a lower court opinion by Brewer, 1896);⁷¹ *Lochner v. New York* (1905);⁷² *Adair v. United States* (1908);⁷³ and *Berea College v. Kentucky* (1908).⁷⁴ In addition, Brewer dissented in several cases in which the Court voted to uphold regulatory legislation in the tradition of *Munn v. Illinois*.⁷⁵ The most famous example is the grain elevator regulation case *Budd v. New York*,⁷⁶ in which Brewer bitterly proclaimed that “[t]he paternal theory of government is to me odious” and predicted that such decisions were making the vision of Edward Bellamy’s *Looking Backward* (which Brewer seemingly read as a dystopian work) “nearer than a dream.”⁷⁷

However, a closer examination of Brewer’s judicial record and his off-the-bench writings reveals the inadequacy of the various views of Brewer as a social Darwinist, a corporate henchman, or some sort of extreme economic libertarian. More thorough studies of Brewer’s actual voting patterns on the Court demonstrate that he was not nearly the doctrinaire opponent of the police power that his critics have made him out to be; nor was he the unrestrained defender of corporate interests that many assumed.⁷⁸

65. DAVID JOSIAH BREWER, *THE MOVEMENT OF COERCION* (1893); David Josiah Brewer, *Protection of Private Property from Public Attack*, 55 *NEW ENGLANDER & YALE REV.* 97 (1891).

66. 134 U.S. 418 (1890).

67. 158 U.S. 601 (1895).

68. 156 U.S. 1 (1895).

69. 158 U.S. 564 (1895).

70. 165 U.S. 578 (1897).

71. 169 U.S. 466 (1898). The lower court opinion was *Ames v. Union Pac. R.R. Co.*, 64 F. 165 (C.C.D. Neb. 1894).

72. 198 U.S. 45 (1905).

73. 208 U.S. 161 (1908).

74. 211 U.S. 45 (1908). Brewer did not participate in the case of *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), in which the Court upheld the doctrine of separate but equal. Hylton, *Judge Who Abstained*, *supra* note 11, at 341–44.

75. 94 U.S. 113, 135 (1878).

76. 143 U.S. 517, 548–52 (1892).

77. *Id.* at 551.

78. Brewer’s voting record is analyzed in detail in Hylton, *Conservative Justice*, *supra* note 11, at 48–54.

Frequently, Brewer's bark proved to be worse than his bite. While Brewer supported judicial review of the reasonableness of state railroad rates in *Reagan v. Farmers' Loan & Trust Co.* (1894)⁷⁹ and *Smyth v. Ames* (1898),⁸⁰ in nine subsequent rate cases that came before the U.S. Supreme Court, Brewer voted to uphold challenged state regulatory schedules eight times.⁸¹ When Brewer came to the Supreme Court in 1890, he was committed to overturning *Munn v. Illinois*,⁸² the Supreme Court's 1877 decision that upheld the authority of states to regulate rates charged by certain unincorporated businesses that were affected with a public interest. However, after his colleagues rebuffed his efforts to overturn *Munn* in *Budd v. New York* (1892)⁸³ and *Brass v. North Dakota* (1894),⁸⁴ he gave up and accepted the legitimacy of the earlier decision.⁸⁵

For all his rhetoric regarding the sanctity of property rights, Brewer was surprisingly reluctant to use the Fourteenth and Fifth Amendments as barriers to state regulation of property. Only twice in his twenty years on the Supreme Court did he file a written dissent in a case in which the majority determined that no taking of property had occurred.⁸⁶ On the other hand, he often could be found defending the state's action when other Justices felt compensation was necessary. In regard to Brewer's approach to takings cases, historian John Semonche, after examining Brewer's opinions from his entire stint on the Supreme Court, wrote: "Based upon such opinions Brewer must be seen as a

79. 154 U.S. 362, 393-94 (1894).

80. 169 U.S. 466, 545-46 (1898). Brewer authored the Court's opinion in *Reagan* and the lower circuit court opinion that *Smyth* upheld.

81. Brewer voted to uphold challenged rate schedules in several cases. *R.R. Comm'n of La. v. Cumberland Tel. & Tel. Co.*, 212 U.S. 414, 428 (1909); *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 54 (1909); *Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 88 (1907); *Ala. & Vicksburg Ry. Co. v. Miss. R.R. Comm'n*, 203 U.S. 496, 500 (1906) (opinion of Brewer, J.); *Seaboard Air Line Ry. v. Florida*, 203 U.S. 261, 269-70 (1906) (opinion of Brewer, J.); *Minneapolis & St. Louis R.R. Co. v. Minnesota*, 186 U.S. 257, 268-69 (1902); *Louisville & Nashville R.R. Co. v. Kentucky*, 183 U.S. 503, 505 (1902); *Chi., Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U.S. 167, 174 (1900) (opinion of Brewer, J.). Only in *Ex parte Young*, 209 U.S. 123, 147 (1908), did he side with the party challenging the rate schedule.

82. 94 U.S. 113, 130 (1877).

83. 143 U.S. 517, 548-52 (1892).

84. 153 U.S. 391, 405-10 (1894).

85. See *Cotting v. Kan. City Stockyard Co.*, 183 U.S. 79, 84 (1901) (opinion of Brewer, J., acknowledging that he was abandoning his assault on *Munn*).

86. *Chi., Burlington & Quincy R.R. Co. v. Illinois*, 200 U.S. 561, 596-601 (1906); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 259-63 (1897). In a few other cases, he joined in another Justice's dissent, as in *Lawton v. Steele*, 152 U.S. 133, 144 (1894) (Fuller, C.J., dissenting), or else dissented without opinion, as in *Eldridge v. Trezevant*, 160 U.S. 452, 469 (1896).

Justice who was quite sensitive to the need to grant considerable latitude to the states.”⁸⁷

Any effort to characterize Brewer as a resolute opponent of the police power on ideological grounds cannot be squared with his overall record between 1890 and 1910. In cases involving challenges to state regulatory authority on any constitutional basis—the Fourteenth Amendment, the Contracts Clause, the Commerce Clause—Brewer approved of the state’s regulatory efforts almost 80% of the time. In 739 cases, Brewer sided with the state 589 times, and those were, of course, cases in which the private parties seeking to overturn state regulation viewed themselves as having a sufficiently likely chance of prevailing to warrant the cost of litigating all the way to the U.S. Supreme Court.⁸⁸ The Supreme Court as a whole upheld the state in 83.8% of these cases, making Brewer only slightly more “opposed” to the police power than the Court as a whole.

In fact, of the twenty Justices who sat on the Fuller Court, nine sided with private parties more frequently than Brewer (who sided with the private party in 20.6% of cases). Included in this group were longtime colleagues Stephen Field (23.9%), John Marshall Harlan (23.5%), Edward White (21.4%), and Henry Billings Brown (20.6%). Brewer was most likely to find regulatory legislation unconstitutional when federal rather than state regulation was at issue, although here also his overall voting record shows that he sided with the federal government in a slight majority of cases.⁸⁹

Moreover, efforts to characterize Brewer as a defender of corporate interests either ignore, or are ignorant of, Brewer’s regular denunciations of excessive corporate power in his on- and off-the-bench writings. Throughout his career, Brewer repeatedly expressed concern about the growing power of large business enterprises in American society. In 1880, while a judge on the Kansas Supreme Court, he publicly called for a new state constitution so that his adopted state would be better able to deal with “gigantic corporations [that] are accumulating great properties, and will soon be found wrestling for

87. SEMONCHE, *supra* note 1, at 119.

88. The statistics in this paragraph are taken from a detailed study of Brewer’s voting patterns in cases involving constitutional challenges to state and federal regulatory activities. Hylton, *Conservative Justice*, *supra* note 11, at 48.

89. *Id.* at 48–50 (discussing Brewer’s voting patterns in federal cases). While Brewer was reluctant to recognize the expansion of federal *legislative* power—opposing it in almost half of the cases—Edward Purcell has argued persuasively that Brewer strongly supported the expansion of federal *judicial* power, a position that was consistent with his faith in the ability of judges to mediate constitutional disputes. PURCELL, *supra* note 62, at 38–63.

political power and control.”⁹⁰ He decried the “accumulated fortunes” of the day as a “danger to all free institutions and a menace to popular government,” and he was an early critic of the Standard Oil monopoly.⁹¹ As a state and federal court judge in Kansas, he compiled an extensive record of upholding state regulatory legislation in the face of constitutional claims of corporate appellants, and in 1889, newspapers as diverse as the *New York World* and the Burlington, Iowa, *Hawkeye* endorsed his nomination to the Supreme Court on the ground that he was a judge who had refused to accede to the wishes of corporations and monopolies.⁹²

While a U.S. Supreme Court Justice, he characterized corporate action as “often selfish, remorseless, and cruel” and branded efforts to “crush out opposition” violations of “the first principles of the Declaration of Independence.”⁹³ He favored granting the states great leeway to tax large national corporations, and he regularly supported prosecutions under the Sherman Antitrust Act, casting the crucial fifth vote for the government in the landmark cases *United States v. Trans-Missouri Freight Ass’n*.⁹⁴ and *Northern Securities v. United States*.⁹⁵ In

90. David Josiah Brewer, *Constitutional Convention*, 3 W. HOMESTEAD 70 (1880), quoted in Lardner, *supra* note 9, at 127.

91. David Josiah Brewer, *The Scholar in Politics*, TOPEKA DAILY CAPITAL, June 13, 1883, quoted in Lardner, *supra* note 9, at 128. He expressed his antipathy to the practices of Standard Oil in *Burlington, Cedar Rapids & N. Ry. Co. v. Nw. Fuel Co.*, 31 F. 652, 657 (C.C.D. Minn. 1887).

92. See, e.g., *Chi., Burlington & Quincy R.R. Co. v. Dey*, 38 F. 656, 662 (C.C.S.D. Iowa 1889) (upholding power of the board of railroad commissioners to determine reasonableness of rates); *State v. Kan. City, Ft. Scott & G. R.R. Co.*, 32 F. 722, 725 (C.C.W.D. Mo. 1887) (upholding state legislation requiring railroad companies to erect a depot at crossings); *National Water-Works Co. of N.Y. v. City of Kansas*, 28 F. 921, 923 (C.C.W.D. Mo. 1886) (upholding state legislation allowing regulation over the operation of water-works companies); *Missouri v. Bell Tel. Co.*, 23 F. 539, 540–41 (C.C.E.D. Mo. 1885) (requiring telephone company to permit communication to companies other than those permitted by its license from the patentee); *Sherman v. Anderson*, 27 Kan. 333, 335–36 (1882) (upholding state legislation requiring railroad to fence railroad tracks to keep out cattle); *Kan. Pac. Ry. v. Mower*, 16 Kan. 573, 575 (1876) (upholding state legislation concerning the killing or wounding of stock by railroads); *State v. Comm’rs of Nemaha County*, 7 Kan. 542, 549 (1871) (opposing in dissent writ of mandamus of the railroad to compel commissioners to issue bonds). For the newspaper endorsements, see undated newspaper clippings in the Brewer Family Papers.

93. David Josiah Brewer, *Some Thoughts About Kansas*, 12 KAN. BAR ASS’N REP. 61, 69 (1895); David Josiah Brewer, Address to the Association of Agents of the Northwestern Mutual Life Insurance Company (1908) (on file with Yale University in the Brewer Family Papers, box 5, folder 186). For an elaboration of Brewer’s dislike of the predatory practices of large corporations, see David Josiah Brewer, *Organized Wealth and the Judiciary*, 57 INDEP. 301, 301–03 (1904), and David Josiah Brewer, Our National Opportunities (Nov. 28, 1907), reported in *Protect Everybody*, Brewer, N.Y. TIMES, Nov. 29, 1907, at 14.

94. 166 U.S. 290, 312 (1897).

95. 193 U.S. 197, 331 (1904). Other cases in which Brewer voted to uphold prosecutions under the Sherman Act include *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *Montague & Co. v. Lounry*, 193 U.S. 38, 46 (1904); and *Addystone Pipe & Steel Co. v. United States*, 175 U.S. 211, 241

1903, he actually was criticized by the *New York Sun* for being too harsh in his criticism of corporate efforts to influence legislative behavior.⁹⁶

Brewer certainly was concerned about the protection of property rights, but to characterize him as an unrelenting advocate of corporate interests or as a doctrinaire ideologue is to ignore what actually happened during his twenty years on the Supreme Court.⁹⁷

V. BREWER'S APPROACH TO DECIDING CASES

Disproving the claims of Brewer's detractors reopens the question of Brewer's significance in the history of the Supreme Court. If he was not the preeminent defender of property rights and the interests of corporations, what was his significance? If he was a central figure on the Supreme Court for more than two decades—which he was—and if his constitutional views were not necessarily extreme or highly objectionable, why is it that so little attention has been paid to his career and even less to his opinions?

First of all, few of Brewer's opinions are counted among the landmark decisions of American constitutional law. A list of ten "noteworthy" Brewer opinions compiled in 2006 by Kermit Hall included four of his dissenting opinions⁹⁸ plus majority decisions in *Reagan v. Farmers' Loan & Trust Co.*,⁹⁹ *In re Debs*,¹⁰⁰ *Kansas v. Colorado*,¹⁰¹ *Muller v. Oregon*,¹⁰² *Berea College v. Kentucky*,¹⁰³ and *Keller v. United States*.¹⁰⁴ Except for *Muller*, in which Brewer upheld the constitutionality of a statute setting maximum hours for women workers, these opinions generally are viewed as being on the wrong side of history, either deferring too excessively to state authority (*Kansas v. Colorado*, *Berea College*, and *Keller*), being too hostile to

(1899). The principal case in which Brewer exhibited his approval of state taxation of national corporations was *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185, 225 (1897).

96. The *New York Sun*'s criticisms were reprinted in the WICHITA EAGLE, Nov. 26, 1904, at 1 (on file with Kansas State Historical Society, Topeka, Kansas).

97. In a recently published article that focuses primarily on the better known cases of the Fuller Court, William Wiecek reaches a similar conclusion regarding the complex character of Brewer's constitutional views and his decisions in actual cases. Wiecek, *supra* note 11, at 183.

98. For this list, see BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT 73 (Melvin Urofsky ed., 2006).

99. 154 U.S. 362 (1894).

100. 158 U.S. 564 (1895).

101. 206 U.S. 46 (1907).

102. 208 U.S. 412 (1908).

103. 211 U.S. 45 (1908).

104. 213 U.S. 138 (1909).

state regulation of private business (*Reagan*), or being too insensitive to the interests of organized labor (*Debs*). (The four dissenting opinions echo similar themes.¹⁰⁵) Such opinions are not truly characteristic of Brewer's overall record on the Court. One also could argue that such a list should include Brewer's concurring opinion in *Northern Securities Co. v. United States*¹⁰⁶ (which for all practical purposes injected the "rule of reason" into the Court's Sherman Act jurisprudence) and his majority opinion in *Church of the Holy Trinity v. United States*¹⁰⁷ (which may well be Brewer's best-known opinion because of its assertion that the United States is a "Christian nation"). However, it is certainly true that a compilation of the Supreme Court's most influential opinions, even limited to those of the Fuller Court era, would include very few opinions by David Brewer.

While the small number of significant David Brewer opinions helps explain the lack of attention his career has received, it only rephrases the question: Why did David Brewer write so few significant opinions when he was on the Court for so long? Why didn't Chief Justice Fuller, to whom Brewer was personally quite close throughout his years on the Court, assign more significant cases to Brewer? The answer most likely lies in Brewer's failure to articulate a theory of constitutional interpretation that relied on anything more than the Justice's intuitive sense of what was constitutional and what was not. Although Brewer clearly had strong constitutional values, he rarely devoted much of his time to translating his views into tightly reasoned constitutional doctrine.

For Brewer, the key to interpreting the U.S. Constitution lay in a set of very broad principles. First, the United States had been founded as a Christian nation, and its laws and institutions had to be understood in that light.¹⁰⁸ Second, Brewer believed that the right of moral self-development was a God-given right, the facilitation of which was one of the central purposes of government. Laws that encouraged moral self-development were legitimate; those that impeded it were not. (In this regard, Brewer was greatly influenced by

105. *United States v. Sing Tuck*, 194 U.S. 161, 170–82 (1904) (Brewer, J., dissenting) (standing against the majority on behalf of racial minorities); *Giles v. Harris*, 189 U.S. 475, 488–93 (1903) (Brewer, J., dissenting) (standing against the majority on behalf of racial minorities); *Champion v. Ames*, 188 U.S. 321, 364–75 (1903) (Fuller, J., dissenting) (allying Brewer with the advocates of state power against federal power); *Leisy v. Hardin*, 135 U.S. 100, 125–60 (1890) (Gray, J., dissenting) (same).

106. 193 U.S. 197, 360–64 (1904) (Brewer, J. concurring).

107. 143 U.S. 457, 471 (1892).

108. Green, *supra* note 11, at 450–51; Hylton, *Christian Constitution*, *supra* note 11, at 422; Przybyszewski, *supra* note 11, at 472–73.

his Yale professor the Reverend Theodore Dwight Woolsey.¹⁰⁹) Brewer believed that support for moral self-development justified laws against vice but otherwise weighed against legislation that was too paternalistic. Moral development was the product of free choice, and a state that told its citizens what to do and what not to do actually hampered its citizens' moral self-development. Rights of property were important because they provided an independent foundation upon which moral self-development could occur.

Third, the link between the religious and moral foundations of the state and its constitutional law was recognized by the founding documents of the American Republic, although the initial incorporation had been incomplete. The Declaration of Independence had recognized the Christian rights of life, liberty, and the pursuit of happiness (and property), but the original state constitutions and the U.S. Constitution of 1789 had been defective, in Brewer's view, because they had provided only partial protection for such rights. That problem had been corrected, Brewer believed, by the Fourteenth Amendment, whose guarantees of the privileges and immunities of citizenship, due process of law, and the equal protection of the laws brought the protections of the Declaration of Independence back into the Constitution.

Finally, apart from the recognition of a need for a national constitutional principle to protect citizens from excessive governmental paternalism, Brewer viewed American federalism from a Jeffersonian states'-rights perspective. The state, not the national government, was ordinarily the sovereign that mattered, and the powers of the national government were to be strictly construed. Although Brewer joined the Republican Party in the mid-1850s, it was the Grand Old Party's antislavery views that attracted him and not its affiliations to Hamiltonian constitutional theories.

For Brewer, the primary role of the judge was to ensure that these fundamental principles were honored by legislatures. Not every exercise of the police power was illegitimate, and it was the role of the judge to determine when the line had been crossed. Whether the case involved the Contracts Clause, the Commerce Clause, the Fourteenth Amendment, or some other provision of the Constitution, the judge's job was to distinguish between the legitimate and illegitimate exercise of state power. However, because these fundamental principles were broad and the variety of situations to which they applied was immense, the effect of their application to any particular situation was

109. The following discussion of Brewer's views in regard to deciding cases is based on Hylton, *Conservative Justice*, *supra* note 11, at 55.

not clear. For Brewer, such decisions were to be made on what was essentially a case-by-case basis. The key to such distinctions was the good sense of the judge and his appreciation of constitutional values rather than the application of some specific analytical formula.

In deciding constitutional cases, David Brewer evaluated the record and the arguments of counsel in light of these larger principles. "Lesser" constitutional principles were of no particular use because all decisions had to be justified in light of the larger principles. Consequently, David Brewer never developed a formula for distinguishing between acceptable and unacceptable restraints on interstate commerce even though he participated in dozens of cases in which this was the central issue. The same was true for what constituted an impairment of the obligations of contracts or a denial of due process. Anticipating Justice Potter Stewart's observation about pornography, David Brewer "knew an unconstitutional use of the police power when he saw one," but he was never able to define precisely what made it so.¹¹⁰ Although his judicial opinions contained numerous citations to authority, his references were usually to earlier pronouncements of general principles rather than to more specific constitutional standards applicable to the case at hand.

For example, Brewer believed that occupational liberty—the right to choose a lawful occupation and to negotiate the terms of employment—was protected by the Fourteenth Amendment. Although he celebrated this right on numerous occasions, he also acknowledged that under certain circumstances the right could be qualified. What Brewer never developed was a formula—other than his own intuitions—for distinguishing between the legitimate and illegitimate regulation of occupational liberty. On the one hand, he was part of the liberty of contract majorities in *Lochner v. New York*¹¹¹ (which involved state limitations on the numbers of hours that bakers could work) and *Adair v. United States*¹¹² (the yellow dog contract case). He defended the correctness of the *Lochner* opinion in his public addresses and articles,¹¹³ and he dissented in a number of cases in which the Supreme Court upheld state restrictions on the employment relationship.¹¹⁴ In all of these cases, Brewer presumably found that

110. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

111. 198 U.S. 45, 53 (1905).

112. 208 U.S. 161, 172 (1908).

113. *E.g.*, David Josiah Brewer, *The Legitimate Exercise of the Police Power in the Protection of Health*, 21 CHARITIES & COMMONS 238 (1908).

114. *See* *McLean v. Arkansas*, 211 U.S. 539, 551 (1909) (requiring miners paid on the basis of coal mined to be paid on the basis of the weight of the coal before screening); *Atkin v. Kansas*, 191 U.S. 207, 224 (1903) (limiting hours for public works employees); *Knoxville Iron Co. v.*

the challenged restrictions were unreasonable as a constitutional matter; however, in each case, he simply dissented without opinion.

On the other hand, in *Muller v. Oregon*,¹¹⁵ he upheld for the Court an Oregon statute restricting the number of hours that women could work in a week, brushing aside the argument that the issue previously had been resolved in the Court's *Lochner* decision. For Brewer, the principles that guided the moral self-development of men did not necessarily apply in the same way to women. The difference between men and women could justify a different judicial result even when a challenged statute was otherwise identical to the one in *Lochner*. But such distinctions were not limited to gender. A few years earlier, in his majority opinion in *Patterson v. The Bark Eudora*,¹¹⁶ Brewer rejected a liberty of contract challenge to an act of Congress that prohibited the advance payment of seamen's wages. (The statute was designed to prevent ship owners from entrapping sailors into disadvantageous contracts by advancing them wages during vulnerable moments.) Restraints on occupational liberty were justified in such cases because sailors, like women, had been demonstrated to be a vulnerable group. In other cases, he voted to uphold an Arkansas statute that prescribed the way in which back wages were to be paid to discharged railroad workers, and he joined a unanimous court in upholding a congressional act that imposed a maximum eight-hour day for workers employed on federal public works projects.¹¹⁷ He also had no problem with the phenomenon of occupational licensing or the outright prohibition against convicted felons entering certain professions.¹¹⁸

What was the difference in the legislation in these two groups of cases? In the former cases, Brewer believed that the regulations were unreasonable, and in the latter he felt that they were not. For an explanation as to how the distinction was to be made, Brewer offered only that in some situations workers needed the protection of the state and in other situations they didn't. He also seemingly changed his mind on certain issues; for example, in spite of his earlier positions, he

Harbison, 183 U.S. 13, 22 (1901) (prohibiting the payment of wages in scrip rather than cash); *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (upholding working hours limitations of individuals engaged in the ultra-hazardous activity of underground mining).

115. 208 U.S. 412, 419 (1908).

116. 190 U.S. 169, 174 (1903).

117. *Ellis v. United States*, 206 U.S. 246, 255–56 (1907); *St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul*, 173 U.S. 404, 410 (1899).

118. See *Hawker v. New York*, 170 U.S. 189, 196 (1898) (affirming the defendant's conviction for the unlawful practice of medicine based on his treating an individual after having been convicted of a felony, finding the statute required that one who had violated the state's criminal laws "should be deemed of such bad character as to be unfit to practise medicine").

eventually supported the constitutionality of hours restrictions on workers in ultrahazardous settings and on public works projects.¹¹⁹

A full understanding of Brewer's thinking on constitutional questions also is hampered by his tendency to dissent without opinion in constitutional cases. This was particularly true of his dissents in labor cases. In *Holden v. Hardy*,¹²⁰ *Knoxville Iron Co. v. Harbison*,¹²¹ *Atkin v. Kansas*,¹²² and *McLean v. Arkansas*¹²³ (all discussed above), he offered no explanation whatsoever for the grounds of his disagreement with the majority.

One of his most intriguing dissents, and one that could have given him the opportunity to explain how to draw the line between claims of individual liberty and state regulatory authority, was his dissent in the 1905 case of *Jacobson v. Massachusetts*.¹²⁴ *Jacobson* involved a state statute requiring adults to be vaccinated for smallpox. The plaintiff, who claimed to have a special allergy to the smallpox vaccine, insisted that the statute was an unconstitutional offense against individual liberty. By a vote of 7-2, the Supreme Court disagreed and upheld the statute. Brewer, along with Rufus Peckham, dissented, but once again, they did so without opinion.

Brewer's written opinions tended to be relatively *pro forma* documents. Brewer typically began his judicial opinions with a summary of the facts and a declaration of platitudes, after which he often inserted a series of quotations from other opinions from a variety of jurisdictions. The precise relevance of the quotations was not always clear, but after the citations, he usually moved to a conclusion regarding the reasonableness or unreasonableness of the challenged law or activity or the appropriateness of the Court's jurisdiction. When Brewer wrote to uphold a statute or municipal ordinance, he usually went to some length to explain why the law was reasonable; if he found it to be unconstitutional, he usually treated the matter as self-evident.¹²⁵ When he chose to write a dissenting opinion, his remarks usually were characterized by what might be called courteous outrage.

119. In Brewer's 1908 essay, *The Legitimate Exercise of the Police Power in the Protection of Health*, *supra* note 113, at 239-40, he specifically endorsed the holding in *Holden v. Hardy* from which he had dissented a decade earlier. Brewer's concurrence in *Ellis v. United States*, 206 U.S. 246, 260 (1907), also indicates a change in mind on the public works issue.

120. 169 U.S. 366 (1898).

121. 183 U.S. 13 (1901).

122. 191 U.S. 207 (1903).

123. 211 U.S. 539 (1909).

124. 197 U.S. 11 (1905).

125. See *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) (upholding the constitutionality of state restrictions on the working hours of females, describing the historical enactment of protective legislation for women); *Patterson v. Bark Eudora*, 190 U.S. 169, 178-79 (1903)

Brewer's approach to opinion writing was not that different from his approach to public speaking. His opinions were straightforward, though at times a little wordy, and crafted in such a way as to grab and hold the attention of a general audience. Although such an approach produced quotable maxims—"The paternal theory of government is to me odious"; "*Looking Backward* is nearer than a dream"; "The government of the Union, then, is, emphatically and truly, a government of the people"; and "This is a Christian Nation"¹²⁶—the approach was unlikely to produce opinions that were of important precedential value or likely to be of interest to future judges and constitutional scholars.

At the time of his death, the *New York Times* described Brewer's lecture style as a product of "straightforward thinking" and "plain but always courteous speaking."¹²⁷ His judicial opinions reflected a similar approach. They were uncomplicated and easy to follow, but they rarely showed an appreciation of, or interest in, constitutional subtleties. The same *New York Times* article further noted that "[h]is lectures and casual addresses showed that he had thought much, studied much, but had been spoiled by neither process."¹²⁸ One easily could make the same observation in regard to his judicial opinions. In deciding cases, Brewer avoided the nuances of constitutional law or constitutional interpretation, and his opinions rarely were burdened with too much learning or analysis.

Was there a connection between David Brewer's relatively perfunctory approach to opinion writing and his extensive off-the-court activities? Perhaps there was. No one ever accused Brewer of shirking his duties as a Justice, and the clerk of the court's record book reveals that he was almost always present in the courtroom when the Court was in session.¹²⁹ The volume of his opinions, if not the quality, also demonstrates that he carried his part of the Court's

(holding that it was not beyond the power of Congress to enact legislation, applicable to both American and foreign vessels, which made it unlawful to pay any seaman wages in advance).

126. See, e.g., *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting) ("The paternal theory of government is to me odious."); *id.* (" '*Looking Backward*' is nearer than a dream."); *In re Debs*, 158 U.S. 564, 578 (1895) ("The government of the Union, then, is, emphatically and truly, a government of the people."); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) ("[T]his is a Christian nation.").

127. *Justice Brewer*, *supra* note 14, at 10.

128. *Id.*

129. Journal of the Supreme Court of the United States (1890–1910). The one period of time in which Brewer was frequently absent was in 1896 when his service on the Anglo-Venezuelan Boundary Commission and the death of one of his daughters in Kansas required him to be away from Washington. See Hylton, *Judge Who Abstained*, *supra* note 11, at 341–44 (describing the reasons for Brewer's abstention from the *Plessy v. Ferguson* decision).

load. Perhaps if Brewer had devoted more of his free time to his judicial duties, he might have become a more sophisticated constitutional thinker. However, that individual would have been an entirely different person from David Brewer.

David Brewer was a significant figure in the history of the Supreme Court, and he played an extremely important role in the public life of his era. His career offers an intriguing case study of how the “liberal” ideals of one generation play out over the course of a subsequent generation characterized by profound cultural and political changes. He was not, however, a sophisticated constitutional thinker; once citations to precedent and the language designed for popular audiences were subtracted, his opinions were rarely more than just votes on the outcomes of cases. When Alan Westin called Brewer “the William O. Douglas of the Right,” he probably was referring to the political views of the two Justices, but the mid-twentieth-century liberal maverick and Brewer also shared a similar approach to deciding cases and writing judicial opinions.¹³⁰ As Douglas’s once lofty reputation continues to fade, the comparison becomes even more apt.¹³¹

The reasons for Brewer’s current obscurity reveal a great deal about why some Supreme Court Justices are remembered long after their service on the Court and why others, equally prominent in their own times, are forgotten. The features that made David Brewer a popular public speaker and the best-known Supreme Court Justice of his era were also the features that limited his influence on the development of constitutional principles. Justice Brewer became a neglected Justice after his death because, at least in the realm of formal constitutional law, he chose to emphasize results over explanations. As a result, he actually had surprisingly little to say.

130. WESTIN, *supra* note 46, at 24.

131. On Douglas, see G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 317–68 (3d ed. 2007) (describing Douglas’s thirty-six years on the Supreme Court, with particular attention given to Douglas’s autobiographical account of his life).